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UTILIZING SCHOOL VOUCHER PROGRAMS TO REMEDY SCHOOL FINANCING PROBLEMS

I. INTRODUCTION

On July 30, 1996, Franklin County Common Pleas Court Judge Lisa Sadler upheld the constitutionality of the Pilot Project Scholarship Plan ("Pilot Project"), which allows Cleveland elementary age students to use public funds to pay for private schools through an educational voucher.¹ In the wake of what undoubtedly will be the first decision of many on the Cleveland voucher program, former Republican presidential candidate Bob Dole announced that voucher programs and school choice alternatives have become the "civil rights movement of the 1990s."² In this era when business and political leaders want to hold students to higher standards, impediments including the "intransigence of the [teacher] unions has slowed the pace of school reforms, eroding public confidence in the [public] schools" Proponents of educational vouchers believe that vouchers would give parents greater control over their children's education, and this control would force the public school system to compete with non-public schools for

1. Mary B. W. Tabor, *Education: State's Voucher Plan Upheld*, DAYTON DAILY NEWS, Aug. 1, 1996, at 2B (This "closely watched decision" is "expected to be appealed as high as the [U.S.] Supreme Court.") The decision is considered a victory for school choice supporters and sets in motion the Ohio legislature's plan for 1,500 kindergarten through third grade students to be provided vouchers for up to \$2,250 for expenditure in private schools, including religious private schools. *Id.* The first appellate stage was reached on May 1, 1997 when an Ohio Appeals Court overturned the decision. *See Simons-Harris v. Goff*, No. 96 APEO8-982, 1997 WL 217583 (Ohio Ct. App. 1997).

2. *Id.* (President Clinton is opposed to the educational voucher program).

3. Thomas Toch et al., *Why Teachers Don't Teach*, U.S. NEWS & WORLD REP., Feb. 26, 1996, at 63, 64 ("Union policies that work against quality teaching are driving many of the top teachers out of public schools, making it tougher for good teachers who stay to do their best work and leaving incompetents entrenched in many classrooms . . . spurring an unprecedented wave of tuition voucher plans and similarly targeted initiatives.").

4. *See* Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937, 940 (1993) ("Currently public education is a public monopoly, with all the defects of a monopoly. Breaking the monopoly and forcing schools to compete in the market place will not only better match student needs and desires with educational resources, but will produce better education for all at a lower cost."); Jack Alan Kramer, Note, *Vouching for Federal Educational Choice: If You Pay Them, They will Come*, 29 VAL. U. L. REV. 1005, 1008-1009 (1995). *See generally* JEANNE ALLEN & ANGELA HULSEY, SCHOOL CHOICE PROGRAMS: WHAT'S HAPPENING IN THE STATES 1 (1992) ("Public opinion polls indicate that most Americans see giving parents a choice of schools as a key reform—perhaps the central reform. Transforming parents into educational consumers will force the school to shape up or lose customers.").

5. *See* Kramer, *supra* note 4, at 1009; *see also* ALLEN & HULSEY, *supra* note 4, at 1 ("It forces teachers and school administrators to improve instruction and toughen standards if they are to retain students--and with them funding.").

students.⁴ The competition for students would foster greater efficiency and quality in the public school services.⁵

Opponents of school voucher programs contend that the problem with public schools is not efficiency, but rather lack of state or federal financial support.⁶ Simply put, the diversion of funds from the public schools into voucher programs is not as effective as pouring those same funds into the public school coffers.⁷

This comment will focus on the existing problems in school financing,⁸ and the judicial treatment of these problems.⁹ Additionally, this comment will address whether school voucher programs are a viable option in addressing school financing inequities,¹⁰ with a particular focus on the existing voucher programs in Cleveland and Milwaukee.¹¹ Finally, this comment will evaluate whether a voucher program would survive equal protection scrutiny.¹²

6. See Amy J. Schmitz, Note, *Providing an Escape for Inner City Children: Creating a Federal Remedy for Education Ills of Poor Urban Schools*, 78 MINN. L. REV. 1639, 1639-1647 (1994) ("outlining the particularly egregious situation in poor urban areas, and explain[ing] why such areas lack sufficient funding and therefore offer the lowest quality education."); see also *American Federation of Teachers Files Lawsuit Against the State of Ohio Over Cleveland School Voucher Program*, U.S. Newswire, Jan. 10, 1996, available in Westlaw, 1996 WL 5618909 (According to Rich DeColibus, president of Cleveland Teachers Union: "[t]he State should be helping the [Cleveland] district return to solvency by assisting us financially and helping us upgrade our educational offerings. Instead in a time of financial crisis, the state has cynically ordered us to divert scarce funds to an experiment that is unconstitutional, unregulated, unproved and discriminatory.").

7. See Richard M. Oldrieve, *Fooling Ourselves About Vouchers*, WASH. POST, Oct. 21, 1996 at A19 (comparing the voucher system to a new company who will go bankrupt, leaving the children to go back to under supported public schools).

8. See *infra* part II.

9. See *infra* part III.

10. See *infra* part VI.

11. See *infra* part V.

12. See *infra* part VII.

13. JAMES W. GUTHRIE ET AL., *SCHOOL FINANCE AND EDUCATION POLICY: ENHANCING EDUCATIONAL EFFICIENCY, EQUALITY, AND CHOICE* 128 (2d ed. 1988) ("The American system of public education is the largest single enterprise of state and local government. Even nationally it is only rivaled by defense and welfare expenditures").

14. JONATHAN F. BUCHTER ET AL., *OHIO SCHOOL LAW, A COMPLETE GUIDE TO LAW AND FISCAL PROCEDURE* 9 (1st ed. 1987 & Supp. 1996) ("In 1993-94, a total of \$8.7 billion dollars was spent on elementary and secondary education in Ohio public schools, with an additional \$272 million spent on education in the joint vocational high schools.").

15. James C. Joslin, Note, *Developing a School Funding Remedy Framework for Ohio and Beyond*, 56 OHIO ST. L. J. 1247, 1247 (1995) (He contends the problem of lack of school funding on the national level is "alarming in magnitude. A recent report issued by the [Federal] General Accounting Office estimates that one-third of the nation's eighty thousand public schools are in such poor repair that students attending them are being educated in unsafe or unsuitable conditions.").

16. Morris L. Hawk, Comment, "As Perfect as Can be Devised": *DeRolph v. State of Ohio*

II. SCHOOL FINANCING PROBLEMS

In nearly every state, the funding of the public school systems is a huge undertaking.¹³ In Ohio, in 1993-94, for example, the Department of Education, placed the per pupil expenditures at \$4,650 from general funds and \$5,035 per pupil from all funds.¹⁴ Despite these enormous outlays, many schools are in disrepair.¹⁵ One writer described these problems found throughout Ohio by stating:

At the Dawson-Bryant School District in rural Lawrence County, the building for grades four through eight is heated by a coal furnace, which leaves a fine layer of dust covering everything inside. The band practices in a former coal bin. On hot days during the first week of school, the Monitor elementary school averages 94 degrees. If more than three teachers plug in fans at the same time, the circuit breakers engage because the wiring is so bad. The entire science department has purchased one item, an aquarium, in the last three years. Most telling, Dawson Bryant School District, as of 1993, had yet to meet Ohio's 1983 minimum education standards.¹⁶

and the Right to Education in Ohio, 45 CASE W. RES. L. REV. 679, 687 (1995) (discussing the plaintiff's offer of proof in an Ohio school district inadequacy case); see also Joslin, *supra* note 15, at 1247 (citing other school facility inadequacies including no restrooms within a school building, the only library in one county is an abandoned library truck, and a school band practicing in a kitchen.); see also William Phyllis, *Children in America's Schools* 8 Ohio School L. J. 57 (1996). (discussing inadequacies and inequities of school funding as presculed in *Children in America's Schools with Bill Moyers* (PBS television broadcast Sept. 13, 1996)).

17. BUCHTER ET AL., *supra* note 14, at 10. In the 1993-94 school year, the percentage of Ohio school revenues were broken down as follows: 50% of the total were from local revenues, 43% were from state aid, and 6% were from federal aid; Id. In addition:

Boards of Education derive their money from several sources: 1) the state foundation program and other state programs; 2) the sale or other disposition of school property 3) local property taxes (that is, general and special levies) and the undivided classified property tax; 4) a school district income tax, if approved by district voters; 5) a shared municipal income tax, if approved by municipality's voters, and 6) miscellaneous sources, such as gifts, federal funds, and tuition.

Id. at 463.

18. *Id.* ("The two major sources of the revenue for most boards of education are taxes levied on property within a school district and the state foundation program.")

19. See CHARLES S. BENSON ET AL., *PLANNING FOR EDUCATIONAL REFORM—FINANCIAL AND SOCIAL ALTERNATIVES* 4 (1974). But see Hawk, *supra* note 16, at 688 "The acknowledged culprit behind these deficiencies is the state's current funding system, the school foundation program: [A] myriad of factors. . . create insufficient funds in some districts and extravagant riches in others."); For a discussion of the local property tax system of raising funds for education and its effects on nonresidential entities, see Kirk J. Stark, Note, *Rethinking State-*

To what can these problems be attributed? One must first examine the school financing scheme. The federal, state and local government all play a role in raising revenues for education.¹⁷ In Ohio, the largest revenue generators are local property taxes and state aid.¹⁸ Local property tax measures are particularly problematic for school districts, especially in areas where property values are lower, because the districts are unable to raise the necessary revenues to support their schools absent raising their tax rate to an exorbitantly high percentage.¹⁹

Revenue raising has become an important issue because most believe that the amount of dollars placed into a school district and the resulting quality of education is intertwined.²⁰ However, some scholars contend that a direct relationship between financing and student achievement has never been clearly established.²¹ Nevertheless, courts have assumed that "money and quality were closely related."²² Assuming *arguendo*, that financing has a direct impact upon academic achievement, there are several measures a school board can take to try to create equity in financing.²³

wide Taxation of Nonresidential Property for Public Schools, 102 Yale L. J. 805 (1993).

20. See generally Hawk, *supra* note 16, at 690. One court "linked the disparities in funding to the lack of educational opportunity by citing evidence that 'school districts with expenditures in the top thirty percent have, by subject matter, higher levels of students succeeding or passing the proficiency tests and scoring satisfactorily on achievement scores.'" (citation omitted). Hawk, *supra* note 16, at 690.

21. See BENSON ET AL., *supra* note 19, at 6-8. ("Do dollars make a difference in education? On the basis of existing research this question cannot be answered unequivocally." The authors believe that the measure of student achievement (student standardized testing) does not test all the areas of what a student needs to know as a result of education. "Such tests tell little about a student's enjoyment of learning, whether he has gained a deeper awareness of himself . . . or whether he will become a thoughtful, capable adult.")

22. William R. Andersen, *State School Finance Litigation*, 14 URB. LAW. 583, 587 (1982) One "New York court was persuaded that money and quality were closely related, enumerating the things money can buy, including transportation, supplies, library materials, textbooks, and 'one of the most important indicators of quality,' the student/teacher ratio." *Id.* Conversely, Andersen contends that the correlation between spending and quality may be less direct and points out that it "is a troubled question, plagued by controversial standards and soft data." *Id.* at 586.

23. One of the measures typically utilized to raise funds is the property tax levy which needs to be approved by the local constituents. The Ohio school financing litigation typifies the property tax struggle. One Ohio common pleas court found that the property tax levy system denies the plaintiffs equal protection and benefit of the law because of the disparities in funding from one school district to another. See *DeRolph v. State*, No. 2043, slip op. at 463, 474 (Ohio, Perry C.P. 1994.) On appeal, the Court reversed this opinion upholding the property tax system and finding that "no expert testimony was offered to establish that [the plaintiff school district] lacked the means to come into compliance for those areas in which school administrators believe that lack of compliance already exists." *DeRolph v. State*, No. CA-477, 1995 WL 557316, at *4 (Ohio Ct. App. 1995). The Ohio Supreme Court recently ruled in the *DeRolph* case that funding schools primarily through property taxes is unconstitutional under the Ohio Constitution. *DeRolph v. State*, 678 N.E.2d 886 (Ohio 1997); see also Joslin, *supra* note 15, at 1253.

24. See Edward A. Zelinsky, *Educational Equalization and Suburban Sprawl: Subsidizing*

A. Approaches to Create Equity in Education

Equalization Aid is one means through which a state could balance out the distribution of financial resources from school district to district.²⁴ One example of equalization aid is called District Power Equalizing (D.P.E.), wherein the state board of education guarantees every school district in the state a minimum fixed figure, or "Assessed Valuation Per Pupil."²⁵ The local school district or policy maker must then determine how to raise their per pupil expenditure by taxing or foregoing spending in other municipal areas, and if they fail to meet their minimum level per pupil, they can apply to the state for additional financial assistance.²⁶ At least one state supreme court has commended its state legislature for enacting the D.P.E. program.²⁷ However, D.P.E. and other equalization formulas have been criticized because they emphasize local choice in these education matters, leaving the state in a position where they can do nothing to induce more or less spending by the individual school district.²⁸

the Suburbs through School Finance Reform, 71 NW. U. L. REV. 161, 166-167 (1976) (The author deems these "alternative aid formulas," which he divides into three types: 1) Flat per pupil grants; 2) Percentage-based cost sharing grants; and 3) Aid devised based on the per pupil taxable wealth.).

25. JAMES W. GUTHRIE, EQUITY IN SCHOOL FINANCING, DISTRICT POWER EQUALIZING 7 (1975) (wherein each school "has the same dollar resource per pupil as any other school district.").

26. *See id.* at 7-13.

27. *See* *McDaniel v. Thomas*, 285 S.E.2d 156, 168 (Ga. 1981) ("The fact that District Power Equalization has been enacted provides an indication that the legislature is aware of the problem.").

28. *See* Guthrie, *supra* note 25, at 10-13 This approach leaves the state in a situation where they may be forced to reward local school districts, who have the financial capacity to meet the minimum student expenditure, but choose instead to forego spending the funds raised through property taxes and merely apply to the state for funding. Proponents contend that the state can combat these instances through different financial incentives, such as by lowering the financial support where a school district has a low property tax rate or low educational spending.

29. *DeRolph v. State*, No. CA-477, 1995 WL 557316, at *2 (Ohio Ct. App. 1995), *rev'd* 678 N.E.2d 886 (Ohio 1997).

30. *See id.*; *see also* Susan L. Klar, Legislative Service Commission Research Memorandum: Financing Ohio Schools, at 1 (Jan. 18, 1995) available in Hannah On-line, *Education* ("The stipulated amount, formally called the "formula amount," [is] established annually by the General Assembly. The formula amount represents a minimum of combined state and local funding that is roughly guaranteed for each pupil. For . . . 1995 the formula amount is \$3,035 per pupil . . .").

31. *See* Klar, *supra* note 30, at 5 (The factor reflects "differences in doing business" from one county to another and for example is "1.0 for Meigs County and 1.075 for Hamilton County.").

32. *Id.* at 4 (The state would supply the aid needed in one of several forms including "basic aid, categorical aid, grants, excess lottery stipends, building assistance and property tax roll back reimbursement.").

33. *See DeRolph*, No. CA-477, 1995 WL 557316, at *2 (However, "[f]or 1992, the State Board of Education postulated that the foundation figure should be \$4,000 per pupil.").

In 1982, Ohio began using the Foundation Formula,²⁹ which is similar to D.P.E.. The Foundation Formula sets a per pupil expenditure per year (in 1992, this expenditure was \$2,817 per pupil), which the state and “the over 600 city, local and exempted village school boards” cannot go below.³⁰ This figure is then multiplied by an area price balancing formula the “school district equalization factor” which differs from county to county.³¹ The total then is what the state guarantees as a minimal expenditure,³² although a school district could choose to go above that level of funding.³³ What should be noted about the Ohio program and any program based on property tax levels combined with state assistance is that they are subject to court scrutiny.³⁴

Another approach to creating equity in public school financing could be a tuition. However, tuition plans have been deemed unconstitutional for school age children in most states.³⁵ Under a tuition arrangement, each child could be charged, even if only for textbooks, courses, materials or activities.³⁶ Although all students would be treated equally, this type of financing would be ineffective for those without the resources to pay. A similar approach could be for a state to charge for non-educational services such as after school sports programs.³⁷

34. See Andersen, *supra* note 22, at 585 (“Perhaps the narrowest line of attack and one permitting the most conventional judicial role is . . . [where] there are unjustified disparities in the funding abilities of the state’s school districts, producing inevitable expenditure and educational differences which cannot be justified under the equal protection clause.”). But, where some minimum level of funding is required it is “more difficult of all for the courts” because in these instances unfairness may not exist, *Id.* at 595; see also *infra* notes 176-189 and accompanying text (concerning equal protection).

35. See GUTHRIE ET AL., *supra* note 13, at 127 (State Constitutions usually specify that all children receive a free education.); see also *Concerned Parents v. Caruthersville School Dist.* 18, 548 S.W. 2d 554 (Mo. 1977) (charging of registration fee unconstitutional). But see *Holler v. Rock Hill School Dist.* 38 S.E. 220 (S.C. 1901) (special circumstances warranted the charging of tuition which was upheld by the state courts); *Kiddie Korner Day Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 285 S.E. 2d 110 (N.C. App. 1981) *prob. juris. noted*, 291 S.E. 2d 150 (N.C. 1982) (tuition charged by elementary school for after school day care did not violate state constitution).

36. See GUTHRIE ET AL., *supra* note 13, at 127; see also Jeffrey F. Ghent, Annotation, *Validity of Exaction of Fees from Children Attending Elementary or Secondary Public Schools*, 41 A.L.R. 3d 752 (1972); *Carpio v. Tucson High School Dist. No. 1*, 524 P. 2d 948 (Ariz. 1974), *cert. denied* 420 U.S. 982 (1975) (fees may be charged for textbooks).

37. See *Atty. Gen. v. E. Jackson Pub. Sch.*, 372 N.W. 2d 638 (Mich. 1985).

38. In Ohio, issue 1 on the state election ballot for November 5, 1996 was a riverboat gambling plan, whereby some proceeds from the gambling were to go to fund state schools. It failed. See Dale Dempsey & Susan Vinella, *Voters Reject Casinos*, DAYTON DAILY NEWS, Nov. 6, 1996, at 3A.

39. Several states have a long history with various lottery proceeds going to education. In school funding litigation, some school systems have contended that these additional proceeds act as “equalization grants to towns” which makes the remaining system constitutional. One court found that this type of “flat grant has little, if any effect on the equalizing the ability of the various towns to finance education . . .” *Horton v. Meskill*, 376 A.2d 359, 369 (Conn. 1977); See generally Paul D. Delva, Comment, *The Promises and Perils of Legalized Gamb-*

Others suggest a state could raise additional revenues for public education through some collateral measure, such as riverboat gambling.³⁸ Lottery proceeds are also sometimes aimed towards public education.³⁹ These programs increase the amount of money in the state treasury but do not directly equalize funding from district to district.⁴⁰

An approach contemplated by at least one scholar is full state funding of education.⁴¹ This approach would require the state to provide all or nearly all the funds to support school districts.⁴² The state would probably need to increase the tax burden on its citizens, but this method of funding would create uniformity and greater equity and opportunity.⁴³ The drawbacks of full state funding include that it centralizes education, taking it away from local actors who might have a better approach to educating their children.⁴⁴

ling for Local Governments: Who Decides How to Stack the Deck?, 68 TEMP. L. REV. 847 (1995).

40. See JAMES A. RAPP, EDUC. LAW, (5.01 (3)(e), at 5-64 (1987 & Supp. 1996) ("Although lottery funds are often designated for education, this usually does not result in a dollar for dollar increase in educational funding.").

41. Richard A. Rossmiller, *Full State Funding: An Analysis and Critique*, in CONSTITUTIONAL REFORM OF SCHOOL FINANCE 43, 43 (Kern Alexander & K. Forbis Jordan eds., 1973) (contending that school financing has become one of the "critical issues of our time," and that due to the rising cost of educating children the "overworked local property tax base" is ineffectual.).

42. *Id.* at 43-44.

43. See *id.* at 67-69 (A more "efficient district organization," "reduction of interdistrict competition" and "greater tax equity" are additional benefits of a full state funding program.).

44. See *id.* at 69-71 (The author lists "regression toward mediocrity," "dilution of local control," "lack of flexibility, innovation or experimentation," and more "competition for revenue" as drawbacks of full state funding.).

45. See Board of Educ. of Cincinnati v. Walter, 390 N.E.2d 813, 820 (Ohio 1979), *cert denied*, 444 U.S. 1015 (1980) ("Pursuant to the Ohio Constitution in 1802, the General Assembly in 1821 enacted a bill enabling local schools and school districts to be organized; and in 1825, the tradition of utilizing real property taxation to support public schools began . . .") (citations omitted).

46. *Id.* ("Ohio has continued this financial partnership with local school districts until the present day.").

47. W. MONFORT BARR ET AL., FINANCING PUBLIC ELEMENTARY AND SECONDARY SCHOOL FACILITIES IN THE UNITED STATES 228 (1970) ("Functional operation and decisionmaking may be decentralized to local school districts, but this should not result in reduced accountability Legal responsibility for all aspects of education resides with each state, therefore, the state through its legislature and various state agencies should have a high level of interest in concerns associated with adequate educational programs, adequate school facilities . . . and fiscal accountability.").

48. See Ted Sanders, *Proposals for the Elimination of Wealth Based Disparities in Education*, Report to the Ohio Legislature, at 4 (June 19, 1995) *available* in Hannah On-line (Sanders, the Ohio Superintendent of Public Instruction writes, "In summary, four principles should guide the reform of Ohio's school funding system: adequacy, equity, flexibility and accountability [I]n the context of this report adequacy means more than barely enough."); See e.g., *DeRolph v. State*, 678 N.E.2d 886 (Ohio 1997).

49. OHIO CONST. art. VI, (2; see also Hawk, *supra* note 16, at 699, 700 (There is a constitu-

B. State and Local Government Involvement in Education Equity

The interplay between state and local actors in the education arena is of major significance. Past history favors the involvement of local interests in school funding,⁴⁵ particularly in Ohio, where "[t]he history of education funding . . . has been an accommodation between two competing interests, the interest in local control of educational programs and the means to fund them and the interest of the state in insuring that all children receive an adequate education."⁴⁶ In addition, the state's interest is also quite compelling.⁴⁷ In Ohio, the state is required to produce a thorough education for all its students, and the state is obligated to provide the funds necessary to meet that requirement within the confines of the Ohio Constitution.⁴⁸ Specifically, the Ohio Constitution, Article VI, Section 2 requires that the General Assembly "shall make such provisions . . . as . . . [to] secure a thorough and efficient system of schools throughout the state."⁴⁹ Accordingly, any state equalization aid or any voucher program must produce a thorough education for all students. Undoubtedly, some approach must be put in place to achieve financial equity of school funding, but it is difficult to find a consensus as to how this should be accomplished.⁵⁰

tional "duty [upon the state] to fund schools, but also a duty to provide sufficient funds to secure a high quality of public education throughout the state.").

50. See e.g. Nancy M. Gaeta, *Solutions to School Finance Inequities Posed by the Levittown Decision*, 14 Urb. Law. 603, 604-616 (1982). Even a Special Task Force on Equity and Excellence in Education in New York, although they could agree, after three years of examination, on many issues, did not agree on all the remedies. *Id.* at 604. The task force was created by the New York governor and board of regents in 1978 and "consisted of business, industry, labor and farming, local government officials, parents, teacher and taxpayers." *Id.* at 603. Their final conclusion was that "the state should ensure that all students be guaranteed at least an adequate basic level of support." *Id.* at 606-608.

51. See David Dormont, *Separate and Unequal: School District Financing*, 11 LAW & INEQ. J. 261, 264 (1992) ("Recognizing the great inequalities caused by budget cuts and unequal funding of education, many parents and school districts are now in court challenging the constitutionality of their state's funding schemes.").

52. The Fourteenth Amendment to the United States Constitution reads in relevant part that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

53. See Stuart Biegel, *School Choice Policy and Title VI, Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L. J. 1533, 1541 (1995) (Beginning as early as the 1960's and 1970's, "aggressive plaintiff's" began to achieve success in their equal protection challenges concerning school financing); see also R. Stephen Browning, *The School Finance Reform Movement in the Courts: A Brief History*, in THE COURTS SEEK FISCAL NEUTRALITY IN EDUCATION 21, 21 (D. Gene Watson ed., 1972).

III. SCHOOL FUNDING AND EQUAL PROTECTION CONCERNS

The school funding problems have led to legal challenges of existing funding systems.⁵¹ One of the primary theories under which the inadequacies of school funding has been challenged successfully is under the Equal Protection Clause of the Fourteenth Amendment⁵² and analogous state equal protection clauses.⁵³ The Equal Protection Clause, although created to secure equal treatment of former slaves, has been interpreted as prohibiting the use of discriminatory classifications to assure the equal treatment of all people.⁵⁴ School financing challengers contend that individuals who are poor are a suspect class under the existing funding system and that because education is a fundamental right, the existing system violates the Equal Protection Clause.⁵⁵

A. Federal Judicial Remedy?

The availability of a federal judicial remedy for the school funding inadequacies was addressed in the United States Supreme Court decision in *San Antonio Independent School District vs. Rodriguez*.⁵⁶ In *Rodriguez*, the plaintiffs challenged the utilization of local property taxes as a primary method of school funding, asserting that the resulting educational system violates the Equal Protection Clause.⁵⁷ The Court, under equal protection analysis, first classified the right involved and the class of individuals affected by the funding program.⁵⁸ The Court's "classifications" are crucial, usually determining the case's outcome.⁵⁹ The *Rodriguez* Court found that lack of wealth is not a suspect class for purposes of the Federal Equal Protection Clause and that education is not a fundamental right under the United States Constitution.⁶⁰ In upholding the property tax approach to financing, the Court noted that "at least where wealth is involved, the Equal Protection clause does not require absolute equality or precisely equal advantages."⁶¹ What the court did leave open, however, was whether education is a fundamental right under an individual state's constitution.⁶² Accordingly, a great deal of litigation has evolved in state courts pertaining to equal protection and school funding.⁶³

54. See *Kramer*, *supra* note 4, at 1040 (The Equal Protection Clause was enacted after the Civil War, and has been extended to "impose a general restraint on the intentional use of discriminatory classifications.").

55. See *Biegel*, *supra* note 53, at 1542.

56. 411 U.S. 1 (1973).

57. See *Dormont*, *supra* note 51, at 274-75 (The plaintiffs included Demetrio Rodriguez, who had four children in the Edgewood Elementary School, which was in poor shape and lacked the necessary school supplies and lacked quality teachers. "Ninety percent of the school district population was Mexican-American, the majority of the remainder was African-American." The Edgewood School District had the highest property tax assessment rate in the area however, but could only raise "\$26 per pupil.").

58. See e.g. *Andersen*, *supra* note 22, at 589 (Under an Equal Protection Clause analysis,

B. State Judicial Remedy?

Despite the large increase in the amount of school funding litigation in state courts, little uniformity exists throughout the country concerning what type of funding scheme meets state equal protection requirements.⁶⁴ A great deal of criticism comes from commentators who contend that most state courts have failed to protect "impoverished urban students" in school finance disparity cases.⁶⁵

the United States Supreme Court first examines whether the "classification under review involves a 'suspect class' or a 'fundamental interest.' If so, the court scrutinizes the classification strictly, striking it down unless the state can show a compelling interest in the classification as drawn which cannot be protected by less harmful means. Other classifications are treated more generously and upheld unless the complainant can negate any rational basis for the classification.").

59. For further discussion of the application of the equal protection clause see the following U.S. Supreme Court cases: *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (discrimination in administration of statute violates equal protection clause); *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977), (discrimination in municipal zoning); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (equal protection invoked in desegregation of schools); *Keyes v. Sch. Dist. #1*, 413 U.S. 189 (1973); *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (invalidating through the equal protection clause an attempt by the federal district court to require the Kansas City School District to create magnet schools, which offer special programs, to draw white students back to the inner cities).

60. *Rodriguez*, 411 U.S. at 25 (The "absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education- the disadvantaged class is not susceptible of identification in traditional terms.").

61. *Id.* at 24. The Court found two compelling arguments in favor of the property tax based systems: 1. The poorest families do not always reside in the poorest school districts. The Court contends that in one state the poorer families lived near large commercial areas which bring in a large amount of property tax revenues and; 2. Children are still being provided an adequate education, even if it is of a poorer quality than that education being provided to richer school districts. *Id.* at 23-24.

62. The *Rodriguez* Court determined that education was not guaranteed by the U.S. Constitution. However, nearly all state constitutions have a guarantee of education. See Andersen, *supra* note 22, at 589; see also Bill Swinford, *Shedding the Doctrinal Security Blanket: How State Supreme Courts Interpret their State Constitutions in the Shadow of Rodriguez*, 67 TEMP. L. REV. 981, 981 (1994).

63. See Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. CIN. L. REV. 1735, 1735 (1995). Since the *Rodriguez* decision, litigants have filed "more than sixty pieces of litigation in forty-one different states." *Id.*; see also Schmitz, *supra* note 6, at 1652 ("Dissatisfaction with funding inequities has become more prevalent after the decision in *San Antonio Independent School District v. Rodriguez*; schools in twenty-eight states have challenged their states' funding systems since 1972.").

64. See Heise, *supra* note 63, at 1735 ("Unfortunately, the litigation has resolved few questions. If anything, the number of questions concerning school finance and their complexity have increased . . ."); See generally, Jonathan M. Purver, Annotation, *Validity of Basing Public School Financing System on Local Property Taxes*, 41 A.L.R.3d 1220 (1972).

65. Among the problems with these state court decisions are that they have provided no remedy in some cases and in others have "ordered noncomprehensive remedies" which are inadequate. Schmitz, *supra* note 6, at 1653; see also Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 102-103 (1996) (Most "lawsuits

Some maintain, however, that the impact of various court decisions is difficult to measure because of the invalid assumption that court decisions directly affect educational spending.⁶⁶ Nevertheless, state supreme courts continue to promulgate decisions concerning school funding plans.⁶⁷

brought to challenge inequalities of educational resources have upheld the existing structures, notwithstanding the proof in many cases of wide disparities between rich and poor districts. . . The quality of the educational opportunities offered in . . . most American urban centers . . . remains shockingly poor.”).

66. See Heise, *supra* note 63, at 1760 After two state supreme court decisions invalidating the school funding schemes, there was an overall decline in the educational funding in the state thereafter. *Id.* at 1761. Parameters such as past state budgets, play a larger role in influencing educational spending than court decisions in these states.

67. See Joslin, *supra* note 15, at 1254 State judiciaries tend to be reluctant to get involved in school finance litigation for several reasons, but are forced to nonetheless. *Id.* One of the reasons is that courts believe they lack “judicial competence” to act in the area as complex and involved as school funding because of the difficulty in assessing how to find a means to provide the best education for all children. *Id.* Another reason is that they do not wish to involve themselves in taxation issues. *Id.* Both of these arguments emphasize why courts tend to defer to the legislature who are more experienced in handling these types of situations.

68. See Swinford, *supra* note 62, at 992 (“[M]any of the courts . . . equated their state constitutions’ equal protection clauses with the Fourteenth Amendment.”).

69. See Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); see also Lafayette Steel Co. v. Dearborn, 360 F. Supp. 1127 (E.D. Mich. 1973) (finding no violation of equal protection clause by applying the rational basis test and not strict scrutiny).

70. One author criticizes Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), where the New Jersey Supreme Court followed the “two tiered test” from *Rodriguez*, and found that education was not a fundamental right under the New Jersey Constitution’s equal protection clause. *Id.* The author contends that the New Jersey court’s decision had a “greater impact on school finance litigation . . . than *Rodriguez*.” *Id.* It found no state equal protection violation but still declared the system of finance unconstitutional. *Id.* The author contends that the Court discarded a key argument. *Id.* A primary distinguishing characteristic between the U.S. Constitution and the N.J. Constitution, namely that the N.J. constitution, like many states, specifically mentions and refers to education while the U.S. Constitution does not. *Id.* The author calls this the “implicit/explicit standard.” *Id.* The author contends that this standard should have influenced the eventual result in *Robinson*, but it did not. *Id.* In fact, many state courts failed to take into account this distinguishing variable, the ‘implicit/explicit standard’ in evaluating their equal protection clauses in school funding litigation finding the “test as unmanageable.” Swinford, *supra* note 62, at 991.

71. See e.g. *Lafayette Steel Co.*, 360 F. Supp. at 1130-1131 (“The most practical method of implementing local control and the most effective way to draw on resources of local communities is to respect existing governmental borders In such a complex arena [taxation] in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.”).

72. See *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), cert. Denied, 432 U.S. 907 (1977); see also *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1977).

73. *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977). Here, the court pointed to Connecticut’s long history of providing for the education of their young with such requirements as compulsory attendance. “[T]he state recognizing that providing for education is a state duty and function now codified in the constitution” and found education a fundamental right.

74. See *id.* at 374-376; see also *Roosevelt Elem. Sch. Dist. #66 v. Bishop*, 877 P.2d 806,

The array of state court decisions regarding state equal protection clauses and school funding plans have several common themes, but varying results. Some courts view their state's equal protection clause to be fundamentally the same as the Fourteenth Amendment of the United States Constitution.⁶⁸ Courts that adhere to this view tend to find that education is not a fundamental right under the state constitution, and consequently find no equal protection violation.⁶⁹

Conversely, some states have struck down the property tax based school funding plans as a violation of their state equal protection clause.⁷² Connecticut's Supreme Court, for example, decided that "the right to education is so basic and fundamental that any infringement on that right must be strictly scrutinized."⁷³ These courts have also expressed concerns that the property based tax systems create a disparity in the quality of education that the students receive across school districts.⁷⁴ One court called for "significant equalizing state support . . . to implement the requirement that the state provide a substantially equal education opportunity to its youth"⁷⁵

815 (Ariz. 1994) (striking down a school funding scheme not entirely based on local property taxes, but primarily based on local property taxes).

75. *Horton*, 376 A.2d at 375.

76. See *supra* notes 25-28 and accompanying text (discussing District Power Equalizing).

77. See *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1139 (Okla. 1987) (upholding school financing system under equal protection which was primarily local property tax based but had a "[f]oundation [p]rogram [which] consists of a certain amount of money per pupil which the Legislature has determined is necessary to operate a minimum program within a school district.").

78. See *DeRolph v. State*, No. 2043, slip op. 463, 474 (Ohio C.P., Perry Co. 1994), *rev'd* CA-447, 1995 WL 557316 (Ohio Ct. App. 1995), *rev'd* 678 N.E.2d 886 (Ohio 1997); see also *supra* note 23 (for a discussion of the *DeRolph* rationale).

79. See *DeRolph v. State*, No. CA-477, 1995 W.L. 557316 (Ohio Ct. App. 1995).

80. Although establishing a basic basement level of spending needed appears to be a simple process, a "myriad of factors converge in its calculation to create insufficient funds in some districts and extravagant riches in others." Hawk, *supra* note 16, at 688; see *supra* notes 29-34 and accompanying text (discussing the Ohio foundation program and its implementation).

81. See Hawk, *supra* note 16, at 690 (The court's rationale for finding education as a fundamental right is by pulling "the right to education from Article I, sections 1, 2, and 7 of the Ohio Constitution.").

82. See *DeRolph*, No. CA-477, 1995 WL 557316, at *3, *4 The appellate court pointed to the prior school finance decision of Board of Educ. of Cincinnati v. Walter, 58 Ohio St.2d 368 (1979), *cert. Denied*, 444 U.S. 1015 (1980), wherein, the Ohio Supreme Court specifically announced that education is not a fundamental right under Ohio Law.

83. *Id.* at *3, *4; (The Court opined that "[t]his issue [school financing and the foundation formula] should not be legislated by the judiciary but should be brought before the General Assembly for public debate and change[d] if necessary or desired"); see also *supra* note 70 (discussing the 'implicit-explicit' test of *Rodriguez*).

84. *DeRolph v. State*, 678 N.E.2d 886 (Ohio 1997).

85. *Rodriguez*, 411 U.S. at 89 (Marshall, J., dissenting).

However, some legal critics maintain that the similarity of state and federal equal protection clauses is not as important as other state constitutional language, particularly references to education.⁷⁶ Despite this criticism, some state courts have upheld funding plans under state equal protection requirements, while arguing that local control of school funding schemes should be respected.⁷¹

However, state equalization formulas, including D.P.E.,⁷⁶ have also come under court scrutiny.⁷⁷ One example is the school funding litigation in Ohio, which started when the trial court in *DeRolph v. State* declared that "Ohio's statutory scheme for financing public elementary and secondary education violates the Ohio Constitution."⁷⁸ The decision, which was reversed on appeal, attacked the school foundation program.⁷⁹ The school foundation program in Ohio sets and guarantees a basic aid level for all schools throughout the state.⁸⁰ In its equal protection analysis, the *DeRolph* common pleas court found education to be a fund-

86. See Enrich, *supra* note 65, at 106-110 ("One class of arguments . . . contending that the state [equal protection] clause, unlike its federal parallel should be construed to bar distinctions, grounded in differences in property wealth, in the fiscal capacity of different school systems in the state [S]econd class of arguments. . . rely on the . . . state's education clause as the justification for reaching a different result under the state equal protection clause than under its federal counterpart [T]hird class of arguments . . . assert that the state's duty to provide for a system of public schools . . . [A]rguments in the first two classes, the focus is on equality [T]he third class of arguments . . . opens the way to a crucial shift in focus, away from educational quality and toward educational adequacy.").

87. One commentator contends that the central theory to the equality argument is that it espouses competitiveness and at the advent of initial school finance reform "the early allure of equality arguments was due, in no small part, to the hope of building on the dramatic expansion of the federal equal protection clause as a tool of social transformation." Enrich, *supra* note 65, at 143. However, the author believes the equality argument is too simplistic, too normative-in that it threatens wealthier districts and that the language of state constitutions create textual conflicts making equality inapplicable. See *id.* at 144-161. Adequacy arguments, however, "find an explicit and straightforward textual source" in most states, appeal to one's sense of "fairness and opportunity" and are less normative—by being far less threatening to wealthier district. *Id.* at 166-169.

88. James A. Peyser, *School Choice: When, Not If*, 35 B.C. L. Rev. 619, 625 (1994) ("[T]oday's public education system fails its own equity test through its reliance on property taxes . . .").

89. PETER W. COOKSON, JR., *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION* 14 (1994).

90. *Id.* One of these school choice alternatives is called controlled choice which includes interdistrict, intrasectional, intersectional, or magnet school choice. In controlled choice, the student or parent is restricted in choosing the other public schools either within or outside their district. Alternatively, open enrollment choice, such as school vouchers, allows parents to choose with virtually no restrictions by area or whether the school is public or private.

91. *Id.* Vouchers are "a specific system of certificate or cash payments by the government that enables public school students to attend schools of their choice, public or private. . . [v]ouchers have a fixed value and are redeemed at the time of enrollment. *Id.* One author describes the basic definition of vouchers as follows:

amental right under Ohio law and applied strict scrutiny to the foundation program.⁸¹ The *DeRolph* appellate court disagreed, finding education not to be a fundamental right under Ohio law, and applying the rational basis test.⁸² The *DeRolph* appellate court was particularly critical of the trial courts determination that the key to evaluating fundamental rights is whether the constitution specifically mentions education and the court also gave deference to the legislature in resolving school finance issues.⁸³ In April 1997, the Ohio Supreme Court reversed the decision, agreeing with the common pleas court that Ohio's current school funding plan is unconstitutional.⁸⁴

C. Equality or Adequacy Decisions under Equal Protection

The *Rodriguez* decision also sparked debate about whether *equality* or *adequacy* is the key in equal protection analysis. In Justice Marshall's dissent in *Rodriguez*, he wrote that "[t]his Court has never suggested that because some adequate level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to minimal sufficiency but rather to unjustifiable inequalities of state action."⁸⁵ This leaves open whether a party should challenge on the basis of whether all districts are provided equal funding, or whether all districts are provided adequate funding.⁸⁶ Although the initial school finance challenges came under a demand for equality, there has been a shift to adequacy arguments, which have been more successful.⁸⁷ This may be due to what one legal critic calls the "equity myth" in education, about which he writes:

[U]nder a voucher plan, the state issues a document called a voucher to each parent for each child eligible to attend public schools. The parent then delivers that voucher to the school of his or her own choice. The number of vouchers received by a school determines the amount of tax funds available to the school to finance the education at that school.

Robert J. Bruno, *Constitutional Analysis of Educational Vouchers in Minnesota*, 53 ED. LAW. REP. 9, 10 (1989).

92. See MILTON FRIEDMAN, *THE ROLE OF GOVERNMENT IN EDUCATION*, IN *ECONOMICS AND THE PUBLIC INTEREST* 123 (R.A. Solo ed., 1955); Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J. L. & SOC. PROBS. 423, 427 (1995) (allowing parents to choose between public and private schools would foster competition).

93. Stick, *supra* note 92, at 424 ("Because public schools exist as local monopolies . . . they have little incentive to make decisions on the basis of productivity.").

94. *Id.* at 427-28 ("Vouchers . . . became linked to segregation . . ." and concern arose that southern white families might be provided vouchers to circumvent the existing desegregation process.).

95. See COOKSON, *supra* note 89, at 7 (Reagan waged an "ideological war against government spending, wasteful public institutions and the welfare state in general.").

96. See ALLEN & HULSEY, *supra* note 4, at 1 (contending that every statistical measure shows student scores declining). "Last year, for the fourth consecutive year, the Scholastic Aptitude Test scores dropped. The 'Report Card' issued . . . by the National Educational Goals Panel reveals that only 14 percent of American eighth graders can solve math problems involv-

Closely linked to the education establishment's assumptions regarding the socializing power of the common school is the belief that government monopoly is the only way to ensure equity in a society rent by social, ethnic and economic divisions. The track record of public education as an integrator of all American children on the long schoolbench does not support this belief.⁸⁸

IV. DEFINING EDUCATIONAL VOUCHERS

Educational vouchers have been generally categorized as a type of "school choice," wherein a student or their family is "actively engaged in choosing schools."⁸⁹ There are a substantial number of school choice alternatives, including vouchers.⁹⁰ Vouchers involve providing parents with a certificate which they can use in place of money to pay for their child's tuition at the private school of their choice.⁹¹

ing fractions, decimals, percentages and simple algebra . . .") *Id.*

97. See e.g. Carol Innerst, *AFT Sues Cleveland to Stop New School Voucher Program*, WASH. TIMES, Jan. 11, 1996, at A5.

98. See COOKSON, *supra* note 89, at 112-117. Parental choice and direct governmental aid to private schools whether private or public has been practiced for some time in the Netherlands and England with varying results.

99. John F. Witte, *The Milwaukee Parental Choice Program*, in SCHOOL CHOICE, EXAMINING THE EVIDENCE 69, 69-71 (Edith Rasell & Richard Rothstein eds., 1993); see CENTRE FOR EDUCATIONAL RESEARCH AND INNOVATION, SCHOOL, A MATTER OF CHOICE 150 (1994). The program was started in the late 1980's by state representative Polly Williams. Williams and other voucher supporters "resented the idea that the only way for black inner-city children to get a good education was to be bussed miles out of town."

100. See CENTRE FOR EDUCATION RESEARCH, *supra* note 99, at 150, 151.

101. *Id.* at 149 ("around \$2,700 in 1992-93.").

102. Witte, *supra* note 99, at 71 (the program is "carefully targeted and limited in a number of important ways").

103. *Id.* at 71 (This "translates into approximately \$22,000 for the modal three-person family.").

104. *Id.* at 71 (The private school must also be within Milwaukee).

105. See *Davis v. Grover*, 480 N.W.2d 460, 473-474 (Wis. 1992) The public purpose doctrine dictates that public expenditures must be for some public purpose. *Id.* In addition, the Court found that the program did not violate the uniformity clause, which provides that all schools should be free and as uniform or similar as possible. *Id.* The Court held that "the M.P.C.P in no way deprives any student of the opportunity to attend a public school with a uniform character of education . . . [T]he uniformity clause clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin." *Id.* at 474.

106. See Michael E. Hartmann, *Cleaning Up with Banquo's Ghost in the Dairyland? A Brief (Economic) Analysis of the Milwaukee Parental Choice Program's Unconstitutional Conditioning of its Aid on an Effective Waiver of a Recipient's Free Exercise of Religion: Professor Richard A. Epstein's Bargaining with the State and Miller v. Benson*, 27 AKRON L. REV. 445, 446 (1994) ("If a state gives school-choice aid to individual parents . . . can it constitutionally attach a condition coercing, pressuring, or inducing such a parent to in return effectively waive the free exercise of religion by preventing the use of that aid—by, again, an individual — for tuition at a sectarian school?") (emphasis in original).

Milton Friedman is believed to be the first modern academic to propose a type of educational voucher. Specifically, he suggested that families be given a fixed stipend for each child in elementary or secondary school to be utilized at the school of the parent's choice.⁹² Chief among his arguments for this type of system is that it promotes competition between schools, leading to greater efficiency and offering parents the type of programs they want for their children.⁹³ Friedman's plan, set forth in 1955, never met uniform public acceptance due in part to the school segregation concerns which were being addressed at the same time, and because the voucher program could possibly inhibit certain anti-segregation measures.⁹⁴

107. See *Miller v. Benson*, 68 F.3d 163, 164 (7th Cir. 1995). The initial voucher program did not include religious schools. *Id.* Thereafter, the Wisconsin legislature repealed the Wisconsin statute (119.23 and enacted a new statute which took away the requirement that the school be non-secular "The new law, which took effect on July 29, 1995, authorize reimbursement of tuition at religious schools, provided the schools (and students) meet the other statutory criteria." *Id.* The 7th Circuit decided that this legislative measure made the Court battle to include religious schools moot. *Id.*

108. See *State v. Jackson*, 546 N.W.2d 140 (Wis. 1996) (the Wisconsin Supreme Court was evenly divided, and accordingly no definitive determination has been made concerning the applicability of religious private schools in the M.P.C.P.); Cf. Suzanne M. Steinke, Comment, *The Exception to the Rule: Wisconsin's Fundamental Right to Education and Public School Financing*, 1995 WIS. L. REV. 1387, 1388 (1995). Even though funding disparity persists in Wisconsin, their courts have not taken an active role in rectifying the inadequacies. "The Wisconsin Supreme Court . . . has not required the state legislature to create an equitable education finance system."

109. See Witte, *supra* note 99, at 75. Witte performed case studies in the springs of 1991, 1992 and 1993 and the results of his data include a listing of students in the program, the attrition rate, the number of private schools participating and the number of voucher applicants. His study revealed that "the number of applicants to the school voucher program has grown in 1990-91 total of 577 to the 1992-93 total of 1034 students. In addition, the attrition rate, or the number of students who failed to return to the program in subsequent years dropped from .465 to .35 between 1990-91 to 1991-92"

110. See *infra* notes 148-150 and accompanying text.

111. See Carol Innerst, *Rights Groups, Teachers Join Suit to Block Vouchers*, WASH. TIMES, Feb. 1, 1996, at A6 (William Mellor, a school voucher advocate and president of the Institute for Justice stated, "The sole purpose of Ohio's voucher program is to help get poor kids an education, period.").

112. *Id.* ("The district and 29 states, including Maryland and Virginia, have seen grass-roots or legislative activity. . . [in favor of] vouchers").

113. Sharon Schmickle, *Today's Focus*, STAR TRIBUNE, Oct. 14, 1996, at 1A. State Representative Michael Fox, a republican, believes the opportunity to pass the voucher program greatly improved in 1994, when the Republicans gained a majority of the Ohio General Assembly and joined a Republican Governor, George Voinovich. *Id.* Prior to that the issue of school vouchers had divided the state of Ohio, but the political situation was different from a state like Minnesota where a Republican governor was unable to produce the needed support from the Minnesota legislature to pass a similar voucher plan. *Id.*

114. See *id.* (The proponents of the statewide voucher initiative saw opposition from several avenues including "teacher's unions . . . suburban school board and PTA members- even from members of [Governor] Voinovich's staff." Accordingly, the program shifted from a statewide initiative to a lesser city-wide initiative).

School voucher proposals began to resurface in the late 1980s due in large part to President Ronald Reagan's cuts in federal spending.⁹⁵ The public school system was particularly vulnerable because despite educational spending increases, student performance tests showed continuing decline.⁹⁶ Currently, Milwaukee and Cleveland are the only United States cities in with voucher programs.⁹⁷ However, school vouchers have a long tradition outside the United States, particularly in England and the Netherlands.⁹⁸

V. EXISTING VOUCHER PROGRAMS

A. Milwaukee Parental Choice Program

The Milwaukee Parental Choice Program ("MPCP"), the first government-subsidized voucher program in the United States involving private schools, was enacted in September, 1990.⁹⁹ The Milwaukee plan allows funds from the state government which were initially targeted for the public schools to be utilized for poor families as tuition at private schools.¹⁰⁰ This grant to lower income children is equivalent to the amount the state provides per pupil to each public school district.¹⁰¹

115. Andrew Benson, *Rich or Poor, Family Income is Prime Predictor of How Well a Student will Perform in School*, CLEV. PLAIN DEALER, Oct. 8, 1995, at 1C. The newspaper grading these schools based on a two year set of student achievement tests and the passage rates on the ninth grade proficiency exam. The author contends that the "relationship between the levels of poverty in a [Cleveland] district and the passage rates on the ninth-grade proficiency test is statistically significant." *Id.*

116. *See Packing them in Series: Agenda 1996 Cleveland Schools*, CLEV. PLAIN DEALER, Oct. 16, 1996, at 14B. The article also discusses the attempts by the Cleveland school district to bring kids into schools during a student count. In order to receive certain state funds, the Cleveland schools wanted as many of their enrolled students as possible to be in school during this student count. The schools took measures that included "snow cones and skating parties, pizzas and pencil sets." The system estimates that in 1995 they failed to count "6,000 to 7,000 students" which cost the district "well over 1 million dollars in state aid"; *see also* Schmickle, *supra* note 113, at 1A ("On the average day in Cleveland, 16,000 of the 72,000 public school students don't show up for classes."); *But see Election '96: The Pressure is On: Cleveland Wins School Levy*, AMERICAN POLITICAL NETWORK DAILY REPORT CARD, Nov. 11, 1996, at 6 (discussing the recent school levy which passed in the Cleveland area which should help to alleviate school district financial woes).

117. *See American Federation of Teachers Files Lawsuit Against The State of Ohio Over Cleveland School Voucher Program*, *supra* note 6, at *1.

118. *Id.* ("75% to 90% of the cost of tuition for each child enrolled in the program" would be paid out of state taxpayer pockets).

119. The statute provides that:

[E]ach Scholarship or grant to be used for payments to a registered private school or an approved tutorial assistance provider is payable to the parents of the students entitled to the scholarship or grant. Each scholarship to be used for payments to a public school in an adjacent school district is payable to the school district of attendance by the superintendent of public instruction.

The MPCP is very specific in its purpose and scope.¹⁰² Some school voucher proposals tend to be more inclusive of lower to middle income families but the Milwaukee plan requires the family "income limit be 175% of the poverty line,"¹⁰³ which is a low threshold. Additionally, there is a cap on the number of students that could be involved in the program and a requirement that the school selected must be private and non-secular.¹⁰⁴

Almost immediately, the boundaries of the Milwaukee plan were challenged. The voucher plan withstood an initial court challenge on March 3, 1992, when the Wisconsin Supreme Court held that the public purpose doctrine and the uniformity clause of the Wisconsin Constitution was not violated by the MPCP.¹⁰⁵ Initially, the federal courts were asked whether the Milwaukee program is constitutional in light of its restraint on the students ability to utilize the school voucher in religious private schools.¹⁰⁶ In the interim, the Wisconsin assembly passed new legislation that included religious schools in the voucher program.¹⁰⁷ However, the courts did not reach consensus whether the change to include secular private schools was constitutional.¹⁰⁸

OHIO REV. CODE ANN. (3313.979 (Banks-Baldwin Supp. 1996). (Subsection (A) (2) provides in relevant part: "From time to time, the state superintendent shall make a payment to a parent of each student entitled to a scholarship. Each payment shall include for each student . . . a portion of seventy five or ninety percent . . . of the scholarship amount . . ."). *Id.*

120. See Innerst, *supra* note 97, at A5.

121. See Tabor, *supra* note 1, at 2B. The funds are to come from the "state's Disadvantaged Pupil Impact Aid Program."

122. Christopher Davey, *Voucher Plan Faces suit: Group alleges church-state violation*, CIN. ENQUIRER, Jan 11, 1996, at B1. Despite the high number of applicants, a critic of the plan contends that half of the children who will receive vouchers from the pilot project already attend private schools.

123. See *American Federation of Teachers Files Lawsuit Against The State of Ohio Over Cleveland School Voucher Program*, *supra* note 6, at *1 ("41 of the 43 private schools within the city are religiously affiliated").

124. See OHIO. REV. CODE ANN. (3313.978 (Banks-Baldwin Supp. 1996).

125. See Schmickle, *supra* note 113, at 1A; Akron industrialist attorney David Brennan was responsible for financing and developing the two non-sectarian schools. *Id.* Brennan, a Republican, is considered a Milton Friedman voucher purist who believes that the education consumer (the parent) is entitled to any curriculum they desire for their children and that the voucher program is the best means to achieve that objective. *Id.* Brennan, while speaking before an Ohio legislative committee prior to the adoption of the voucher plan said that "research indicated that approximately 20% of the students' parents would choose vouchers." David Brennan, Testimony to Assembly Senate Education, Retirement and Agent Committee (Feb. 28, 1995) (available thru Hannah On-Line at Education, Select School Funding, Select Report to Ohio Legis.)

In a telephone interview with David Brennan, he made clear his continuing desire to help make educational vouchers a statewide program. Telephone interview with David Brennan, Partner, Amer Cunningham & Brennan (Nov. 14, 1996) (notes from interview available from author). He believes that a universal school choice program could save millions of

Some initial figures indicate that the Milwaukee choice program has been taking incremental steps in both increasing the number of students wishing to participate in the program, and also improving the number of students who stay in the program.¹⁰⁹ At this juncture, because of the limited scope of the program, it would be difficult to determine whether the MPCP is an overall success, however its relative success in addressing lack of equity in school funding will be evaluated in this comment.¹¹⁰

dollars. *Id.* He contends the voucher initiative should be viewed not as an educational issue but an economics issue. He was especially adamant in expressing that the current government funded public school system is a monopoly which a voucher system can help to improve through competition. *Id.* Even further, he contends that educational system in America resembles a more Eastern European type system rather than the free enterprise system that this country was built on.

126. See *American Federation of Teachers Files Lawsuit Against The State of Ohio Over Cleveland School Voucher Program*, *supra* note 6, at *1.

127. See *infra* notes 177-197 and accompanying text (discussing the Equal Protection Clause and the Pilot Project).

128. *Gatton v. Goff*, Nos. 96CVH-01-193, 96CVH-01-721, 1996 WL 466499 (Ohio C.P., Franklin Co., 1996), *rev'd sub. nom.* *Simmons-Hams v. Goff*, No 96 APEO9-982, 1997 WL 217583 (Ohio Ct. App. 1997).

129. See *infra* notes 187-189 and accompanying text.

130. The opponents of the Pilot Project attacked the rationale of the program and its potential effectiveness arguing the funds would be better appropriated to the public schools. See *Gatton*, 1996 WL 466499, at *5.

131. The Court cited the federal Constitution which provides in the 1st Amendment that "Congress shall make no law respecting the establishment of religion." U.S. CONST. Amend. I. In addition, Section 7 Article I of the Ohio Constitution prohibits the state law from giving preference to a religion. OHIO CONST. Art. I, (7; see *id.* at *7; The Court found that neither clause was violated because the "nonpublic sectarian schools participating in the scholarship program are benefited only indirectly and purely as a result of the 'genuinely independent and private choices of aid recipients'." *Gatton*, 1996 WL 466499, at *14.

132. See *id.* at *17 ("The General Assembly chose not to establish the program on a statewide basis, choosing instead to establish it in a limited manner. . . . [T]he General Assembly's choice to establish the program only in . . . Cleveland City School[s]. . . was reasonable. . . [s]ince the General Assembly intended the program to be a pilot project. . . .").

133. For a comprehensive discussion of the establishment clause constitutional concerns with vouchers and private school choice, see Jeremy Paul, *The Day, Berry & Howard Visiting Scholar Response — Losing Our Religion*, 28 CONN. L. REV. 269 (1996); Michael J. Stick, *supra* note 92; Peter J. Weishaar, comments, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543 (1994); David Futterman, Note, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Parochial Schools*, 81 GEO. L. J. 711 (1993); Amy Christine Hevly, Note, *Nothing Simple or Certain: Establishment Clause Barriers to Choice Systems in American Education*, 35 ARIZ. L. REV. 467 (1993).

134. See Innerst, *supra* note 97, at A6 ("Ohio's Republican governor, George V. Voinovich signed a two year state budge that includes a \$5.25 million for a school-choice program in Cleveland in the 1996-97 school year.").

135. Schmickle, *supra* note 113, at 1A ("Opponents, including [President] Clinton, cite constitutional concerns. They also argue that vouchers will sap support for state-run schools and siphon taxpayers' money into a myriad of private schools that can't be held accountable for

B. *The Cleveland Pilot Project Scholarship Program*

The proponents of the educational voucher system received a boost when in July of 1995, Cleveland became the second city to receive a state voucher program.¹¹¹ This is despite efforts in the District of Columbia and twenty nine other states to bring voucher programs into existence in their areas.¹¹² The battle to get the Pilot Project adopted in the Ohio State legislature was deemed "trench warfare" by one legislative supporter of the measure.¹¹³ Upon realizing that the voucher program would not pass on a statewide basis, Ohio legislators in favor of the program turned their attention to the troubled Cleveland School District.¹¹⁴ Among the many Cleveland School District concerns were: (1) "Cleveland ranked 595th out of 600 school districts in Ohio, and 95th out of 96 school districts in the seven-county Greater Cleveland area;"¹¹⁵ (2) Cleveland had more than \$150 million dollars of debt;¹¹⁶ and (3) in March 1995, a Federal Judge placed the Cleveland City School District under state receivership.¹¹⁷

It is believed that the Pilot Project would be subsidized by state taxpayers who would pay over three quarters for costs of the children involved in the program.¹¹⁸ The Pilot Project statute provides the parents of the students involved in the program a voucher that can be used at private schools registered with the state.¹¹⁹

what they teach.").

136. Eisdorfer, *supra* note 4, at 941 ("[T]he most radical school choice reforms would disestablish the existing system of public schools and replace it with a system of educational vouchers . . .").

137. Hawk, *supra* note 16, at 679 (Hawk provides the State School Executive Directors response to Voinovich which was, "I would invite the governor and his staff to visit some of these districts and show them how to get more for the buck . . . He would find kids going to school without bathrooms. He would find kids going to school in coal bins.").

138. Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883, 883 (1993) (citing PETER F. DRUCKER, *THE NEW REALITIES* 235 (1989)).

139. *Id.* at 883 ("Throughout the public sector, increasingly cash-strapped governments cannot provide the services citizens demand . . . The public sector on the local, state and even the federal level has increasingly turned to the private sector.").

140. See GUTHRIE ET AL., *supra* note 13, at 318 (efficiency could mean one of several things, including wanting it to "cost less, perform more quickly, be less complicated, have more useful features, be of higher quality, and all for the same or lower price.").

141. *Id.* The author calls this "allocative efficiency" and describes a situation where a person going to the store to buy bread, instead finds only starch or spaghetti available and hence, the producers have not properly understood or "anticipated consumer preferences." *Id.* It follows from this that without new competitive market forces there is no way to buy bread. *Id.*

142. *Id.* Accordingly, "the near monopoly of the public schools may restrict choice more than is necessary to protect the public welfare." *Id.*

143. See Futterman, *supra* note 133, at 728 ("The voucher plan clearly increases the financial incentive to choose religious schools by lowering their price . . . [T]he voucher system in the primary and secondary school context significantly changes the price structure of the available options. Under the voucher plan . . . religious schools [are] more attractive.").

Kindergarten through third grade students are eligible for these vouchers which can be renewed through the completion of eighth grade.¹²⁰ About 1,500 public school students are eligible for and could be provided the \$2,250 voucher,¹²¹ for which there were upwards of 6,000 Cleveland parent applicants in January of 1996.¹²² One difficulty the Ohio legislature faced in enacting the program was that the Cleveland area had very few non-secular private schools for children to attend.¹²³ The legislative response to this concern was to allow for sectarian private schools to be considered eligible as a private school under the Pilot Project.¹²⁴ In addition, one proponent of the Cleveland voucher program funded and created two nonsectarian schools in the Cleveland area because of the Pilot Project.¹²⁵ Nevertheless, allowing students to utilize vouchers at religiously affiliated private schools draws into question whether the Pilot Project violates the Establishment Clause,¹²⁶ and the federal and state Equal Protection Clauses.¹²⁷

The first challenge to the Pilot Project was in the Franklin County Common Pleas court case of *Gatton v. Goff*.¹²⁸ Although much of the argument centered on legal criterion, particularly constitutional grounds,¹²⁹ the school choice opponents did place several policy arguments before the court in *Gatton* and questioned the legislative decisionmakers in passing this law.¹³⁰ The Court found that "[i]t is not the purview of this court to consider the wisdom behind the program at issue." However, the Court did address arguments based on the federal and state Establishment Clauses.¹³¹ The court seemed swayed by the fact that the Ohio legislature intended the program to be experimental in nature and limited in its size and scope, and upheld the program.¹³² A more extensive statewide program could well have been declared unconstitutional or at the very least have been subject to greater scrutiny, particularly based on the Establishment Clause.¹³³

144. See Kramer, *supra* note 4, at 1017 (In a universal voucher system "[o]nly schools that provide what the consumer demands, quality and efficiency for example, would survive."); see also Peyser, *supra* note 88, at 619-620. (Peyser believes that choice will occur for three reasons: "[f]irst, parental wishes in a matter as life-shaping as education should not be ignored or overridden by state bureaucrats. . . *Id.* at 619 second, choice strengthens parental commitment to the schools their children attend. . . [t]hird choice has inherent value within a free society." *Id.* at 620.

145. A glorious example of this is in Fridlay High School in Minneapolis where Cathy Nelson, a Ph.D. history teacher, once named the state of Minnesota's teacher of the year, was laid off under a teacher's union requirement that the last hired would be first fired in that school district. Nelson was laid off a total of three times under the policy and, by 1990, decided to leave teaching. See Toch et al., *supra* note 3, at 64. Additionally, some courts have protected school board decisions to provide more experienced teachers tenure, making them harder to dismiss from work. See *Board of Educ. v. Raubinger*, 187 A.2d 614 (N.J. 1963) (contending that creating tenured positions for the principal or teachers makes the school system strong and efficient.).

146. Cf. Kramer, *supra* note 4, at 1009 ("[P]roviding parents with the power to choose a non-public school for their child will compel the public school . . . to increase the quality and efficiency of the school's services.").

Despite its limited scope and size, the overall cost of the Pilot Project is said to be over \$5.25 million dollars per year.¹³⁴ Opponents of the program are very concerned that the voucher program will strip public schools of necessary funding (in Ohio that figure is several million dollars a year), and may have a detrimental effect on the overall state of public school education.¹³⁵

The difficult question is which argument is correct. The proponents argument that vouchers will create competition and efficiency in the public schools, or the opponents argument that the funding is best spent on updating the public school system as it exists. In essence, the issue is whether vouchers work as a means of remedying school financing problems.

147. Michael A. Rebell, *Educational Voucher Reform: Empirical Insights from the Experience of New York's Schools for the Handicapped*, 14 URB. LAW. 441, 443 (1982) ("[C]urrent private schools, by eliminating high administrative overhead, expensive facilities and extra personnel, keep costs almost 50 percent below average public school costs."). Voucher advocates believe that they can provide solutions to the two major problems in public schools, "fiscal retrenchment and integration."

148. Deborah E. Beck, Note, *Jenkins v. Missouri: School Choice as a Method for Desegregating an Inner City School District*, 81 CAL. L. REV. 1029, 1047 (1993). Specifically, the State of Wisconsin spends \$3500 to \$5000 per public school pupil as opposed to the \$2500 per pupil at the private school. *Id.* The author suggests that the St. Louis School system adopt a voucher program like Milwaukee in order to further desegregation in the city public schools. *Id.*

149. Witte, *supra* note 99, at 103.

150. The results of this survey by Paul Peterson have been disputed by another scientist, John Witte, who contends that there has been no noticeable difference in test scores between private school voucher students and public schools students. See Bob Davis, *Class Warfare: Dueling Professors have Milwaukee Dazed over School Vouchers*, WALL ST.J., Oct. 11, 1996, at A1. Witte tested Milwaukee public school students generally against the voucher students, however, Mr. Peterson tested voucher students against random applicants who did not enter the voucher program. *Id.* Voucher proponents believe that the first step to making the public-schools more efficient is by outperforming the public schools equal to the public schools at a lower cost. *Id.*

151. Eugenia Froedge Toma, *Public Funding and Private Schooling Across Countries*, 39 J.L. & ECON. 121, 121 (1996) "Production studies that have examined the relative performance of students in private and public schools typically find that the average student achievement in private school exceeds that of the average student in public schools. *Id.* The relatively small enrollment of students in private schools seriously limits policy predictions concerning the effects of vouchers and other policy reforms in the United States."). *Id.* In an examination of four country systems found that in Belgium, Canada, France and New Zealand, where the state funds the private schools, the private schools substantially outperform public schools. See *Id.* at 123. However, the author does point out that private schools are traditionally smaller and larger enrollment may be detrimental to there overall success. *Id.* at 121.

152. See Witte, *supra* note 99, at 113-115 (contending that the "family and student background" and the "academic track" are the keys to "slightly higher" test scores).

153. Albert Shanker & Bella Rosenberg, *Do Private Schools Outperform Public Schools*, in THE CHOICE CONTROVERSY 128, 128 (Peter W. Cookson, Jr. ed., 1992). These authors contend that private school students have richer parents who tend to be more involved in their education which also effects achievement scores. *Id.* They also contend that in most testing that the results show equivalent achievement between private and public schools. *Id.* It should be

VI. SCHOOL VOUCHERS AS MEANS TO REMEDY SCHOOL FINANCING PROBLEMS

Fundamentally, there are four arguments made by school choice and voucher advocates which set forward why these programs can create equity in education: (1) Choice/vouchers are a more efficient way to run the school system; (2) Choice/vouchers could eliminate the administrative defects currently prohibiting schools from being effective; (3) Choice/vouchers provide an incentive to get parents more involved in their children's education; and (4) Choice/vouchers gives the impoverished family the same alternatives in schooling as the affluent.¹³⁶ As opposed to state equalization programs, each of these arguments focuses on the open market's ability to drive educational costs down through competition, making it affordable for all students, and creating equity in education.

A. *Can Efficiency Be Achieved Through Vouchers and Competition?*

When Ohio governor George Voinovich was asked about the Ohio public school system, he stated that "[i]t's time for results. It's time to get something out of our money . . . They have to do what everybody else has to do. They have to restructure."¹³⁷ Central to the argument for vouchers is the lack of the competition incentive in the public schools. As one commentator suggests:

America is the only major developed country in which there is no competition within the school system. The French have two parallel systems. . . a public one and a Catholic one, both paid for by the state. So do the Italians. Germany has the Gymnasium . . . In Japan, schools are graded by the performance of their students on university entrance exams. The teachers of high ranking schools are recognized, promoted and paid accordingly. The American public school, by contrast, has a near monopoly—no performance standards and little competition either within the system or from the outside.¹³⁸

noted that one of the authors, Albert Shanker, is the head the American Federation of Teacher.

154. See e.g., Nanci Hellmich, *Values and Good Manners are on the Curriculum*, U.S.A. TODAY, Oct. 16, 1996, at 6D ("After years of declining enrollment, attendance at parochial schools has been on the upswing since 1990.").

155. See Julie H. Vallarelli, Note, *State Constitutional Restraints on the Privatization of Education*, 72 B.U. L. REV. 381, 396- 397 (1992) ("A pure educational voucher system operates on the theory that families will enroll their children in the best available school . . . [and] vouchers encourage families to leave the public school system rather than voice dissatisfaction . . .").

156. A great deal of research indicates that "race and class based views" affect a parents ability to determine what truly is a good or bad school. For example, black parents tend to perceive a school as "good" if it is predominately white. Accordingly, an all white school with

Unquestionably, American schools need to get more "flexible, adaptive and innovative."¹³⁹ The question is whether vouchers can do this. Defining efficiency in education is a difficult endeavor because it could mean several things.¹⁴⁰ What is clear is that efficiency in education is "enhanced when providers [including private schools] are free to enter the marketplace with new ideas, products and services and when consumers are at liberty to select from what is available."¹⁴¹ In our present school scenario, public schools are expansive and clearly controlling the market.¹⁴² A voucher plan could change this by making private schools, whether religious or not, a viable alternative by improving their financial competitiveness with public schools.¹⁴³ Some contend that this type of competitiveness will spark the public schools to respond to consumer (parent) demand and provide the quality of service that the parent desires.¹⁴⁴

One of the ways a voucher system could operate to spark competitiveness and efficiency is in the area of hiring and retention of teaching talent. In the current public school system, seniority overcomes teaching talent and skill because seniority rules prohibit school administrators from dismissing ineffective veteran teachers, forcing the school to dismiss competent but less senior teachers.¹⁴⁵ The school voucher program could combat this development by providing the competitive public school the incentive to keep good teachers.¹⁴⁶ Otherwise, they could lose these teachers to private schools along with their students.

poor teachers or a poor curriculum would still be perceived as a "good" school by some parents. One author believes that voucher advocates who point to competition, including Milton Freidman, are typical of those who do not understand preferences in evaluating schools. See Amy Stuart Wells & Robert L. Crain, *Do Parents Choose School Quality or School Status? A Sociological Theory of Free Market Education*, in *THE CHOICE CONTROVERSY* 65, 65-67 (Peter W. Cookson, Jr. ed., 1992).

157. See *id.* at 67 ("It is important to keep in mind that school choice policy will only force schools to improve if parents prefer 'school quality'—in terms of the actual instruction . . . in the classroom—over other school characteristics, such as location, extracurricular activities, or the status of the students who attend.").

158. See *supra* note 153 and accompanying text.

159. See Davis, *supra* note 150, at A1 ("The [voucher] fight also reached into Sunday's presidential debate . . . Mr. Clinton responded that he wouldn't back federal voucher schemes that 'take money away from all the children we now help with limited federal funds and help far fewer.'").

160. See Shmitz, *supra* note 6, at 1642 ("A study of sixth graders at over a thousand inner city schools, for example, reported that all but a handful had average reading scores more than a year below the national average."). The author points to the "existence of decrepit, dangerous and over-crowded facilities" as the key reasons for this lack of achievement. *Id.* at 1643.

161. Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, 39 (1993)(This could "lead—at a minimum—to the impoverishment of the public schools and the establishment of a two-tiered educational system.").

162. One author discusses a Kentucky Supreme Court decision and states that there is a need for educational reform, not by increasing the financial "input" to public schools, but rather by focusing on the "output". Joslin, *supra* note 15, at 1264-65. The author suggests this can be done by focusing on "incentives and not more money." *Id.* at 1264.

Another argument for the voucher program is that private schools have managed to educate children at a lower cost than public schools, making them more efficient. One author contends that private schools keep costs per pupil almost fifty percent below that of public schools.¹⁴⁷ These numbers are quite telling, and call into question whether the public schools really do have the ability to restructure their resources and better cost maximize.

This exact concern can be found in the Milwaukee City schools system where the private nonsectarian schools clearly can and have provided a less expensive education than the public schools.¹⁴⁸ Researchers of the MPCP have stated that due to the small scale of the program, any results of the 'competition' between private and public schools in Milwaukee is inconclusive.¹⁴⁹ At least one scientist contends that voucher students have performed better on standardized tests than other random students who were rejected from the voucher plan.¹⁵⁰ If this is true, the Milwaukee public schools should stand up and take notice of the private school's ability to better educate students at a lower cost.

Additionally, several studies have shown that private school student achievement is higher than that of public schools.¹⁵¹ While these private school students continually outperform their public school counterparts, some authors still believe that the influence of private schools on achievement is insignificant and point to such things as the student's background, including family involvement, and the type of academic curriculum the individual student takes, as the real reasons for the small differences in achievement.¹⁵² Still others contend that because of the socioeconomic differences between private and public school students, and the fact that private schools are selective in their admissions, private school students are underachieving unless they leave public schoolers "in the dust."¹⁵³ Whatever the cause, the fact remains that private school students in general outperform public school students in achievement tests. It is also interesting to note that private school enrollment, after years of decline, is now on the rise.¹⁵⁴

163. Particularly, the selective plans such as the Milwaukee Parental Choice Plan and the Cleveland Pilot Project Scholarship program, which are both small and selective in their criterion for involvement. See Schmickle, *supra* note 113, at 1A.

164. See Heise, *supra* note 63, at 1737; see also *supra* notes 45-50 and accompanying text (discussing the state's responsibility to provide an efficient education).

165. Futterman, *supra* note 133, at 729. The author in discussing the constitutionality of tuition plans, assumes a more comprehensive voucher plan would pass Constitutional muster. *Id.* The larger size plan would increase availability of vouchers to a great many more students. *Id.*

166. See Schmickle, *supra* note 113, at 1A.

167. Clifford S. Romans, *State Regulation of Private Religious Schools: Compelling State Interest and the First Amendment I* (1981) (Dissertation, Kent St. Univ.).

168. One author labels this concern a violation of the "accountability clause" because private actors do not focus on the desire to act in the public interest in providing their education-

Another key factor, that most scholars agree upon, is that parents would choose a more efficient or better school if given the voucher option.¹⁵⁵ Some contend, however, that the social status of the parents, including their racial and economic class, interferes with their ability to be self maximizing consumers in the education setting.¹⁵⁶ Accordingly, while a school may be economically efficient in educating students and maximizing their student achievement, some parents might still choose to have their child forego attending the school and choose another based on the parent's background and belief of what is a good school.¹⁵⁷ There are also those who contend that achievement tests are not a fair indicator of academic achievement.¹⁵⁸

Alternatively, if the economic model is correct, the efficiency of private schools and their increased competition with public schools in the voucher arena could lessen the burden on school financing schemes and taxes by making all schools operate on less money. Accordingly, the inequities of the property tax based financing scheme could be equalized by providing vouchers to all state students.

B. Arguments Against Vouchers as School Financing Remedy

The first argument brought by voucher opponents is that public schools are as efficient as they can be, based on their clear lack of resources.¹⁵⁹ The public schools in some poor urban areas lack sufficient funding, which truly creates the low quality education overall.¹⁶⁰ One critic writes that "[f]unds allocated to pay for vouchers inevitably come out of the overall public school budget. In a time of shrinking state revenues and substantial cuts in federal education assistance, it makes little sense to expropriate precious resources from the public schools and give them to private schools."¹⁶¹ However, at least one legal scholar and some courts contend that the answer to educational problems does not rest in increasing the money spent on public schools.¹⁶²

al services, while public schools must follow the public interest. Vallarelli, *supra* note 155, at 393. Accordingly, "private providers are most likely to overlook the effects of their programs on community members who do not use their schools." *Id.*

169. The greater interplay between state regulation and attempts to control religious institutions have produced the most litigation in areas such as "teacher regulations and curriculum." Romans, *supra* note 170, at 2.

170. Vallarelli, *supra* note 155, at 391 ("Because schools in almost every state are operated by local bodies, the delegation of municipal functions to private actors is of primary interest.").

171. *Id.* at 392 ("Courts are more likely to uphold private delegations when the interests of the private actor resemble those of the delegating body or its constituents.").

172. *See id.* at 392-393 ("Education may therefore appear ministerial but its substantive content, which can significantly affect students and their families, is quite discretionary. . .").

173. The development of this type of program "creates a level of expertise in teachers and enriches the curriculum so that parents desire their children to be involved in the program." *See Mary A. Raywid, The Mounting Case for Schools of Choice, in PUBLIC SCHOOLS BY*

A more compelling argument against school vouchers is that they are a selective remedy which do nothing to improve the system overall, but rather only help a few individual students.¹⁶³ School voucher opponents point out that all children are entitled to a certain level of education and it is the state's responsibility to provide that for them, and to bring all school districts up to par by increasing financing.¹⁶⁴ Currently, the Milwaukee and Cleveland plans only effect a few students, and only by substantially increasing the size and scope of a plan could vouchers "at least nominally be available to help all students."¹⁶⁵

Voucher programs which utilize private schools also raise another concern. Opponents of vouchers, including President Clinton, contend that the private schools involved cannot be held accountable for what they teach.¹⁶⁶ There are and have been a panoply of different state government attempts to regulate private schools, their requirements and curriculum.¹⁶⁷ However, private schools may not be required or may not wish to respond to these regulations.¹⁶⁸ One overwhelming problem could be that vouchers would lead to an increase in litigation because as one researcher contends, "the states which have the most extensive [school requirements and] regulations . . . were the states which have experienced [the most] legal challenges."¹⁶⁹ This may also call into question the nondelegation doctrine, which limits the ability of the state or municipal government to vest private actors with state power.¹⁷⁰ Turning over education entirely to private school actors in a voucher program may violate the anti-delegation clause. At this juncture, "the delegation of municipal power allow private actors to perform functions that are administrative, ministerial and proprietary rather than executive, discretionary and governmental in nature."¹⁷¹ It would seem that an educational institution, by setting up and implementing their curriculum, has a great deal of discretion.¹⁷²

CHOICE 13 (Joe Nathan ed., 1989).

174. GUTHRIE ET AL., *supra* note 13, at 332.

175. Toch et al., *supra* note 3, at 71. These measures include "performance-based pay in Cincinnati, and policing of the teaching ranks by peers in Columbus . . ." *Id.*

176. A voucher plan would also face challenges under the state and federal establishment clause. *See supra* note 133.

177. Kramer, *supra* note 4, at 1041 ("The Equal Protection Clause could pose a barrier to a poorly drafted voucher program . . .").

178. *Id.* at 1041-1042.

179. This is particularly true in school districts which are attempting to utilize a choice plan, such as vouchers, to remedy their existing segregation problem. *See* Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems Be Overcome?*, 43 DEPAUL L. REV. 1, 47-48 (1993). The use of school vouchers to remedy existing segregation problems has been discussed in several articles. For an example, see the extensive discussion of vouchers to remedy segregation in Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795 (1995). *See generally* James B. Egle, Comment, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 459, 495-496 (1992).

School voucher opponents also point to several alternatives within the public school framework which could increase efficiency in educating students without vouchers. One such approach would be to increase the amount of non-traditional schools, such as alternative or magnet schools, within existing school districts so that parents may select to send their children to these special schools with greater expertise.¹⁷³ Another approach that may be taken, within the public school system is "client opinion polling", where a school district, not unlike a private company, incorporates customer (parent) feedback.¹⁷⁴ In addition, school teachers and their unions have begun to incorporate salary increases based on the teachers achievement, as opposed to experience, as a means to increase accountability and efficiency in public schools.¹⁷⁵

Some measures need to be taken to make public schools more accountable for the product that they put out, and these measures are certainly a step in the right direction. However, voucher proponents insist that an outside force would be more effective than these internal mechanisms.

180. Freidman's original school choice proposal was not given consideration because some viewed it as encouraging racial segregation. *See supra* note 93-94 and accompanying text (discussing desegregation concerns).

181. Among the concerns of voucher opponents is that low income families will be left with no financial ability to pay for educational costs beyond the amount of the voucher, and these children would be left again with a poorer quality of education due to the costs. *See Kramer, supra* note 4, at 1041.

182. *See Egle, supra* note 179, at 495 ("Why would students of one race tend to congregate in one school? Racism may be one answer . . . students may be constrained by a lack of information. Wealthy families have more resources to purchase information.").

183. *See supra* notes 85-88 and accompanying text (for a discussion of the challenge based on equality instead of adequacy).

184. One commentator contends that the language of *Rodriguez* goes far in evaluating the equal protection claim. *See Kramer, supra* note 4, at 1044-1045. Because, the court must find that "an absolute deprivation of a meaningful opportunity to enjoy the state benefit" exists, which would not be found in most instances because although the proportionate share of funds from one district to another may be different, it does not mean that an absolute deprivation exists. *Id.* at 1045.

185. *See supra* notes 85-88 and accompanying text (discussing school finance litigation and inadequacy arguments).

186. *See Hawk, supra* note 16, at 694-696 (discussing the *DeRolph* trial court decision which set forward that "education is a fundamental right under the Ohio Constitution" and as such the school foundation program was subject to strict scrutiny and was invalidated.) The *DeRolph* trial court spent a portion of its decision discussing the poor school conditions in some districts, which is indicative of a school financing argument based on adequacy and not equality. *Cf. DeRolph v. State*, No. 2043, slip op. 463, 474 (Ohio C.P., Perry 1994).

187. *See Gatton v. Goff*, Nos. 96CVH-01-193, 96CVH-01721, 1996 WL 466499, at *4 (Ohio C.P., Franklin, 1996) *rev'd sub. nom. Simmons-Harris v. Goff*, No. 96 APE08-982, 1997 WL 217583 (Ohio Ct. App. 1997). The plaintiffs in *Gatton* attempted to utilize "Section 2 Article VI of the Ohio Constitution which requires the General Assembly to "secure a thorough and efficient system of common schools throughout the state" in order to prove their inadequacy claim. The trial court gave no mention to any argument by plaintiff under the state equal

VII. EQUAL PROTECTION IMPLICATIONS AND COURT SCRUTINY OF SCHOOL VOUCHER PROGRAMS

A. *Equal Protection Analysis*

Even if the school voucher programs can be viewed as a viable alternative in school financing, the voucher system would still need to overcome a judicial challenge under the equal protection clause.¹⁷⁶ Some contend that the key to whether the voucher program survives court review depends on how the plan is drafted.¹⁷⁷ Notwithstanding, it is clear that an extensive voucher program would not survive judicial scrutiny based upon the following: (1) Vouchers can arguably create and perpetuate racial segregation; (2) Vouchers fail to provide an adequate education to all students; and (3) A voucher program will not survive the two-tiered equal protection analysis.

The first argument against a state wide school vouchers are that they create racial segregation,¹⁷⁸ and, if drafters base the voucher plan on the use of racial quotas, it may fail to provide the students equal protection under the law.¹⁷⁹ Traditionally, school voucher programs were attacked based on the potential to create racial segregation.¹⁸⁰ Even today, opponents of the plans point to the possibility that the programs would "exclude low income families from the voucher's benefits if the amount of the voucher is insufficient to cover the total cost of private education."¹⁸¹ This could lead to a situation where lower income minority children and higher income white children become segregated into two separate educational institutions.¹⁸²

protection requirement.

188. *See id.* at *18. The program will effectually "deprive the students in the Cleveland City School District of fair educational opportunities by funneling students and economic resources" *Id.*

189. *Id.* at *19.

190. For example, if a private school decides to exclude a protected class under equal protection analysis, such as based on race or religion. Where this is problematic is that private schools may not be accountable to the state under a voucher scheme for these actions. *See supra* notes 166-172 and accompanying text.

191. *See* Richard C. Reuben, *Are School Voucher Plans Constitutional?*, 1993 CAL. LAW. 35, 38 (1993). (In discussing a California School Voucher initiative, a Pepperdine University Constitutional Law Professor Bernard James stated "the voucher program's flaw on basic notions of equality is too strong to be ignored. *Id.* at 38. If this initiative is approved and we end up with a lot of private schools that reject students on the basis of immutable characteristics, the result is inconsistent with the equal protection objectives of the 14th Amendment." *Id.*

192. *Id.* at 39. Professor Jesse Choper contends that if the protected class is race, that "[i]t is clear . . . that any deliberate discrimination by schools could result in a court order cutting off the aid under the equal protection clause." *Id.*

193. No discussion was given to this type of argument in the Franklin County Common Pleas decision. It should be noted, however, that this argument is intertwined with an Establishment Clause concern which was addressed in the Franklin County Common Pleas decision. *See Gattou*, 1996 WL 466499, at *15-19.

How would the state courts address this problem with vouchers under their equal protection clauses? Assuming that the amount of the voucher is insufficient to cover the total cost of education, the success of the voucher opponent might depend on how they choose to frame their challenge. For example, if the voucher opponent argues that the program operates in a manner where all children are not treated equally,¹⁸³ it is less likely that a court might find an equal protection violation.¹⁸⁴ However, an argument based on inadequacy in school funding under the voucher plan may be more successful.¹⁸⁵

The Ohio courts, for example, have been more willing to criticize school financing plans because they fail to provide a certain level of adequacy for all children.¹⁸⁶ Perhaps in recognition of this, school voucher opponents attempted to utilize this argument in their court challenge to the Pilot Project.¹⁸⁷ The opponents contended that the Pilot Project took students and resources from public schools, which diminished the quality of education for those who remained in public schools.¹⁸⁸ The common pleas court was not convinced of the merits of this argument, finding it "purely speculative," which makes it appear that the plaintiff must provide something more substantial to indicate an inadequacy.¹⁸⁹

Equality in applying a statewide voucher program could be an argument, however, where a private school is selective in their entrance requirements.¹⁹⁰ For example, if the selectivity involves a protected class, the application of the voucher program would be subject to strict judicial scrutiny.¹⁹¹ The Court would in all likelihood then strike down the voucher program.¹⁹²

194. See *supra* note 58 and accompanying text (discussing the two tiered equal protection framework).

195. See *supra* notes 81-84 and accompanying text.

196. This argument can be supported by some recent U.S. Supreme Court decisions discussing Equal Protection and the Free Exercise Clause. In one case, the Supreme Court stated that "[f]ree exercise can be guaranteed only when legislators . . . are required to accord their own religions the very same treatment given to small, new or unpopular denominations." *Larson v. Valente*, 456 U.S. 228, 245 (1982).

197. See *Stick*, *supra* note 92, at 464 ("When the challenged statute grants denominational preferences, strict scrutiny must be applied.").

198. 68 F.3d 163 (7th Cir. 1995).

199. See *supra* notes 105-106 and accompanying text (discussing the M.P.C.P. court challenges.).

200. See *Andres*, *supra* note 179, at 796 (arguing that "private school vouchers provide an effective remedy for violations of students' state education right under state constitutions).

201. See *supra* notes 93-94 and accompanying text.

202. See *Beck*, *supra* note 148, at 1029. The Kansas City school district (KCMSD) has been ordered to be desegregated. *Id.* "To date, however, none of the court-ordered remedies . . . has succeeded . . . The author argues that an alternative remedy-by which the KCMSD would provide tuition vouchers to black children to enable them to attend private schools in the district-is constitutional and worthy of consideration." *Id.*

203. See *Andres*, *supra* note 179, at 802-803. Among these are challenges in "*Jenkins v.*

Under the traditional two-tiered equal protection framework, a voucher opponent may choose to attack the Pilot Project based on its inclusion of religious private schools.¹⁹³ Under the two tiered framework, a court would first evaluate whether the law affects a fundamental right or whether the plaintiff's class is suspect under the law.¹⁹⁴ Although the Ohio courts have struggled with the issue, it appears that education is not a fundamental right under Ohio law, which would eliminate the opponents first contention.¹⁹⁵ In addition, the opponent can contend that religious institutions which do not operate private schools, or operate religious private schools which cannot get state approval to enter the program, are treated unfairly under the Pilot Project and hence, the plan violates the Equal Protection Clause.¹⁹⁶ If religion is deemed a suspect class under the Equal Protection Clause,¹⁹⁷ the Pilot Project statute would be subject to strict judicial scrutiny. Since the state then needs to provide a compelling interest for the Pilot Project as drafted, it is quite likely it would be found to violate equal protection.

Other voucher plans have been attacked under state and federal equal protection clauses, but the results are inconclusive. For example, the federal courts in Wisconsin were faced with an equal protection challenge to the M.S.C.P. in *Miller v. Benson*.¹⁹⁸ The issue became moot, however, before the court attempted to address it.¹⁹⁹

B. Vouchers as a Judicial Remedy

Additionally, vouchers have long been considered and discussed as a potential judicial remedy for school financing inequities.²⁰⁰ Clearly, most advocates of the educational voucher contend that it is a better means of distributing resources than existing school financing plans, including some equalization measures.²⁰¹ In addition, at least one author has suggested that vouchers could be used to remedy desegregation in some inner city schools.²⁰² Some plaintiffs have even begun to request vouchers as a remedy in their education litigation.²⁰³ In these instances, vouchers would be used to supplement or to make up for the deficiencies in the existing property tax based financing system, perhaps temporarily or in a small region.²⁰⁴ On a smaller scale, the voucher programs might be successful. However, a complete statewide scheme of school vouchers available to all students rich or poor,²⁰⁵ might create the same inadequacies of the existing property

Leininger in *Chicago* and *Arviso v. Dawson* in *Los Angeles*" *Id.* at 802. The plaintiffs in each instance have "argued that their local public schools did not provide them with adequate educational opportunities." *Id.* at 803. It should be noted that they did not make their demand under a call for equality between districts. *Id.*

204. *See id.* at 808 ("Vouchers provide a quick, effective, and narrowly tailored remedy for violations of education rights. . . [while] courts [are not forced into] becoming involved in difficult policy decisions.").

205. *See supra* notes 113-114 (discussing the Ohio voucher proponents attempts to pass a statewide voucher program).

tax financing arrangements.²⁰⁶ Although voucher opponents believe the system can operate to create equity in financing, the voucher system would still need some state fundraising mechanism, which alone could create the same concerns as the property tax based financing scheme.

VIII. CONCLUSION

It is undoubtedly true that some measures need to be taken by the state governments to ease our troubled public school education system. However, educational vouchers as a means to spark efficiency in our schooling system may not be an answer in itself. There still remains a gaping hole in the property based school financing system which truly fails to properly distribute the necessary funds to properly educate all of our students.²⁰⁷ While voucher proponents may wish for a statewide system of choice, the legal hurdles, specifically the Establishment Clause²⁰⁸ and the state and federal Equal Protection Clauses,²⁰⁹ may eventually dismantle their plan. Vouchers may be a stronger alternative when utilized on a small scale, as a remedy in desegregation cases, or as a means to bolster an ailing public school system, as in Cleveland. But, the voucher efficiency model championed by Friedman may be fallacious, particularly where public schools truly have no fat to trim to become "competitive."

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206. For example, richer families could still add money on top of a voucher to send their children to more exclusive schools which other voucher parents could not afford under a statewide system; *See also supra* notes 51-84 and accompanying text (discussing the local property tax school financing shortcomings).

207. *See supra* notes 15-19 and accompanying text.

208. *See supra* notes 126, 133 and accompanying text (discussing the Pilot Project and the establishment clause).

209. *See supra* notes 176-195 and accompanying text (discussing equal protection concerns).